No. 452

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LE TOURNEAU COMPANY OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on June 23, 1944 (R. 82),[1] setting aside the Board's order directed against the Le Tourneau Company of Georgia.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 79–82) is reported in 143 F. (2d) 67. The findings of fact, conclusions of law, and order of

[1] "R" denotes references to the "Transcript of Record," and "B. A." references to the Board's appendix.

the Board (R. 55–73) are reported in 54 N. L. R. B. 1253.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 23, 1944 (R. 82). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

The Company promulgated a rule prohibiting the distribution of printed matter on its property. Employees Ferguson and Ayers violated this rule by passing out union handbills on the Company's parking lots, and each was suspended from work for 2 days for the infraction. The plant is in a rural area, distant from any city, on a 6,000-acre tract of land owned by the Company or its subsidiary. Most of the employees live at great distances from it, and their homes are scattered over a large area. The employees' entrance to the plant is set back 100 feet from a public highway and there is a parking lot on the Company's property between the plant entrance and the highway. More than 60 percent of the employees never have occasion to set foot on the highway in going to or coming from work because the vehicles in which they travel are parked on this lot. The questions are whether, in the circumstances of this case, the

Board could properly find (a) that the Company by promulgating and enforcing the aforesaid rule, insofar as it prohibited employees from distributing union handbills on its parking lots, interfered with the exercise of the rights guaranteed employees under Section 7 of the Act, in violation of Section 8 (1); and (b) that the Company violated Section 8 (3) and (1) of the Act by suspending Ferguson and Ayers.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are set out in the Appendix, pp. 17–18, *infra*.

STATEMENT

Upon the usual proceedings the Board, on February 12, 1944, issued its findings of fact, conclusions of law and order (R. 55–73). The pertinent facts, as found by the Board and as shown by undisputed evidence, may be summarized as follows:[2]

Le Tourneau Company of Georgia, a Georgia corporation, hereinafter called the Company, is a manufacturer of earth-moving machinery and other products, and employs more than 2,100 persons at its plant, near Toccoa, Georgia (R. 57–58;

[2] In the following statement references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

24, B. A. 3). The plant site is part of a 6,000-acre tract of land, owned by the Company or its subsidiary (R. 58; B. A. 3), and extends in its entirety along the northerly side of U. S. Highway 13 (R. 58; B. A. 3–4, 6).[3] It is divided into 2 sections by a roadway that intersects the highway (R. 58; B. A. 7). A 6-foot wire fence, roughly paralleling the highway, but set back at distances varying from 30 to 100 feet from the highway (R. 59; B. A. 4, 6), encloses each section of the plant (R. 59; B. A. 4, 5). Virtually all of the employees, irrespective of on which side of the roadway they work, enter and leave the plant through a main gate which adjoins an office building that serves as a section of the fence (R. 59; B. A. 4, 5, 6, 7, 33).[4] This gate is set back from the highway 100 feet (R. 59, 66; B. A. 5, 29); the company-owned ground between the office building and the highway (R. 59; B. A. 29) is paved with concrete (R. 59; 66–67; B. A. 5, 7). This concrete apron and a connecting gravel plot, together called the North parking lot, extend along the highway for 250 feet (R. 59; B. A. 4–5, 6–7; Tr. 108).[5] On the opposite side of the highway is another parking lot, here-

[3] Adjacent to the plant, but on the southerly side of Highway 13, is a hamlet owned by the Company, known as Tournapull, consisting of a United States Post Office, a gasoline station, and about 50 houses, which are occupied by employees of the Company (R. 58; B. A. 3–4). Toccoa is about 3 miles distant from Tournapull (B. A. 3).

[4] The time clocks are inside the gate (R. 59, n. 3; B. A. 7).

inafter called the South parking lot, which is leased by the Company (R. 59; B. A. 5, 8–9, 23, 26–27, 29). Both lots are guarded and kept clean by the Company's plant-protection force (R. 59; B. A. 8, 26–27, 28, 36).

Most of the employees live in widely scattered communities and on farms within a radius of 20 miles of the plant (R. 58, 67; B. A. 4). They travel to and from work by automobile or bus (R. 59, 67; B. A. 5, 8–9, 11, 27, 28–29, 30). The conveyances in which about 60 percent of them travel are parked on the North lot; most of the others are parked on the South lot (R. 59; B. A. 8–9, 11).

Since July 1941, the Company has strictly enforced a rule prohibiting all persons from distributing printed matter of any kind on its property without permission (R. 61; B. A. 27–28, 48, 34–36, 37–38).[5] In February 1943, the Congress of Industrial Organizations, hereinafter called the C. I. O., began to organize the Company's employees, and on April 8, 1943, the Board held an election at the plant, which the C. I. O. lost (R. 61; B. A. 12–13, Tr. 37). On the day of the Board election, employee Grady Ferguson, after completing his day's work, boarded a bus standing on the North parking lot (R. 62; B. A. 25, 12–13).

[5] Before the rule was promulgated, merchants from nearby towns employed boys to place advertisements in the parked automobiles, a practice that had resulted in littering (R. 60; B. A. 34–35). Thefts from the automobiles had also occurred from time to time before the rule was adopted (*id.*).

On entering the bus, Ferguson found a few C. I. O. leaflets, some of which he gave to fellow passengers, and others of which he handed through an open window to persons on the parking lot (R. 62; B. A. 25). The Captain of the Plant Guard saw the incident, and instructed Ferguson to report to the plant manager the next day (R. 62; B. A. 25–26); the Plant Manager suspended Ferguson from work for 2 days because of his violation of the "no-distribution" rule (R. 62; B. A. 26).

After the defeat of the C. I. O., the Union undertook to organize the Company's employees (R. 61; B. A. 12–13). On July 15, 1943, employee L. Wayman Ayers, president of the local union, asked for permission to distribute handbills in and about the plant announcing a Union meeting, but the Plant Manager denied his request (R. 62; B. A. 13–14). The next day, Ayers distributed a few union handbills on the South parking lot during his lunch hour, in the mistaken belief that this lot did not belong to the Company (R. 62–63; B. A. 13–16, 21, 39–40). A plant guard observed his actions, which were ultimately reported to the General Manager. The latter suspended Ayers for 2 days because of his violation of the "no-distribution" rule (R. 63; B. A. 13, 16–18, 24, 39–40).

United Steelworkers of America, affiliated with the C. I. O., the labor organization that filed the charges in this proceeding (R. 55; 14–15).

Upon the foregoing facts the Board concluded that although the "no-distribution" rule had "been applied to all persons, without exception, seeking to distribute literature on the parking lots" (R. 64), the Company, "in applying its 'no-distributing' rule to the distribution of union literature by its employees on its parking lots * * * placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization, * * *" (R. 68). The Board pointed out:

> * * * respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its subsidiary. Apart from U. S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. This, in itself, seriously limits the possibilities of effectively communicating with the bulk of the respondent's employees. This limitation would not, however, be too restrictive if the respondent's gate opened directly onto the highway, for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But at the respondent's plant the

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Cf. *Matter of Adolph Spalek* and *William J. Zrenchik*, copartners, doing business as *Spalek Engineering Company*, 45 N. L. R. B. 1272.

> gate is 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or busses parked in the space between the gate and the highway [i. e. the North parking lot], and presumably speed homeward, without ever setting foot on the highway. Distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is consequently seriously impeded (R. 66–67).

After thus emphasizing the serious detrimental impact of the rule upon the employees' freedom of self-organization, the Board turned to a consideration of the possible detriment to the employer's interests which would flow from abrogation of the rule as applied to the parking lots. The Board recognized that the Company had a legitimate interest in preventing littering, but found that that interest did not justify the rule under "the peculiar facts of this case" (R. 67). The Board noted that littering on a parking lot is not as serious to an employer as would be littering within buildings where production is being car-

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The impediment was particularly serious in the instant case, as the Board stated (R. 67), because "the employees' homes are scattered over a wide area"; hence, "In the absence of a list of names and addresses, * * * direct contact with a majority of the respondent's employees away from the plant would be extremely difficult" (R. 67).

ried on * * *" (R. 67), and that the Company had no general rule against littering (R. 67; B. A. 31). In balancing this employer interest against the employees' right to solicit membership for their labor organization and to enjoy their right to communicate with one another for the purpose of self-organization, the Board, emphasizing that this case presents a situation in which the employees could not as a practical matter distribute union handbills at the plant gates, found that the public interest in affording the employees a practical opportunity to enjoy their rights under the Act outweighed the employer's interest in preventing littering on its parking lots (R. 67). In answer to the contention that the rule was designed to prevent thefts, the Board found (R. 68) that thefts had ceased when outsiders were denied access to the lots and that in any event the rule could have no bearing upon that problem because under the rule the employees continued to have free access to the lots (R. 67-68). In answer to the Company's final contention—namely, that the rule lessened the likelihood of employees bringing literature into the plant itself—the Board pointed out that the Company has no rule against employees carrying newspapers or other printed matter into the plant; and that it places copies of a magazine in boxes near the plant gate which the employees can take with them into the plant (R. 68; B. A. 9-10, 30).

The Board therefore concluded that the Company, by applying its no-distribution rule to the distribution of union literature by its employees on its parking lots, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 71) and by suspending Ferguson and Ayers for violations of the rule, discriminated in regard to their hire and tenure of employment in violation of Section 8 (3) of the Act (R. 68, 71).

The Board ordered the Company to cease and desist from its unfair labor practices; to make Ferguson and Ayers whole for the wages they lost during their respective two-day suspensions; to rescind the rule insofar as it prohibits distribution of union literature by employees in the parking lots; and to post appropriate notices (R. 72–73). On February 24, 1944, the Company petitioned the court below to set aside the Board's order (R. 8, 1–7). Thereafter the Board, answering the Company's petition, requested that its order be enforced (R. 9–13). On June 23, 1944, the court below handed down its opinion and entered a decree setting aside the Board's order in its entirety (R. 82).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding, as a matter of law, that the Company's application of its "no distribution" rule to prevent the distribution of union literature by employees on parking lots did not interfere with

its employees' exercise of the rights guaranteed them in Section 7 of the Act.

2. In holding without qualification that there is "no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts [by his employees] on his premises" (R. 81), and that an employer may therefore insist "that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property" (R. 81).

3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that in the instant circumstances, the application of the rule to employee conduct on the parking lots constituted interference in violation of Section 8 (1) of the Act.

4. In holding that the suspension of Ferguson and Ayers for having violated the rule did not constitute discrimination respecting hire and tenure of employment violative of Section 8 (3) of the Act.

5. In setting aside and denying enforcement to the Board's order.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *Republic Aviation Corporation* v. *National Labor Relations Board*, 142 F. (2d) 193 (C. C. A. 2), certiorari pending, No. 226, this Term, in which the Board

has filed a memorandum consenting to the granting of a writ of certiorari. The fundamental issue in both the *Republic* and the instant case is whether, and to what extent, an employer may prohibit his employees from engaging in union activity on company property outside of working time. In the *Republic* case, an employee who solicited membership for his union in the plant during the lunch hour was discharged for violating a rule prohibiting solicitation of any kind in the plant (51 N. L. R. B. 1186, 1187, 1195–1196). If, as the Second Circuit held, the Board may order an employer not to prohibit union solicitation within the plant outside of working hours, it would seem to follow that it could make a similar order with respect to a rule governing the distribution of literature in a parking lot, which would cause, if anything, less interference with the employer's business.

The same considerations impelled the Board in both cases to find that the employers' application of their respective rules was in derogation of rights guaranteed employees by Section 7 of the Act. In broad outline, these considerations are that the application of the plant rules in the special circumstances under which the employees in both cases worked and lived resulted in a virtual denial to them of the rights guaranteed by the statute, and that the detriment which the employers would have suffered from abrogation

of the rules was not sufficiently serious to warrant denial of the employees' rights.

In the *Republic* case the Circuit Court of Appeals for the Second Circuit upheld the Board's position, saying that the Board could properly weigh "what in fact will be the prejudice to the interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it" (142 F. (2d) at 196). It held further that the Board is empowered in the first instance to determine "whether the benefit [to the employer] shall prevail over the prejudice [to the employees] or vice versa" (*id.* at 196), and that "only in cases where [the reviewing courts] believe that there is no reasonable warrant for the priority actually awarded" (*id.* at 196), may the courts set aside the Board's determination. In contrast to this ruling, the court below held that an employer need not furnish "a theater" for his employees' efforts at self-organization; that he may lawfully insist "that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property" because, said the court, "there is no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts on his premises" (R. 81). Thus, the court below excluded as irrelevant the competing considerations that the Board and the Circuit Court of

Appeals for the Second Circuit deem controlling, and held that plant rules forbidding union activity on company property are lawful however destructive their impact upon employee rights of self-organization unless the rules are adopted or applied for the purpose of discouraging union membership (R. 81).[9]

2. The questions presented in the instant case, as in the *Republic* case, are of importance in the administration of the National Labor Relations Act. In both cases, the Board findings reveal (compare pp. 5, 7–8, *supra* with 51 N. L. R. B. 1186, 1195–1196), that the employees live over a widely scattered area at great distances from the plant; in both the plants are situated in a region remote from any city. In such circumstances, as the Board has found (*id.*), the plant is the normal—indeed the only—place at which the employees

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[9] The Circuit Court of Appeals for the Sixth Circuit held such a rule valid in a case where the Board had not passed on the rule. *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 805, 806. The Circuit Court of Appeals for the Tenth Circuit has twice, by way of dictum, expressed its view that such a rule is valid unless it was adopted "merely as a device to obstruct or impede self-organization," once in a case where it upheld the Board's finding that the rule was adopted merely for anti-union purposes (*National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. (2d) 410, 411), and the second time in a case in which it set aside a finding that employees were discriminated against because of union activities and held that they were properly punished for violating a valid no-solicitation rule. *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423, 435.

can, as a practical matter, exercise their right to self-organization. Only at the plant, where they all congregate, can they adequately communicate with one another; insurmountable practical barriers stand in the way of any attempt by such employees to reach any large number of their fellow workers at home. If in such plants the Board were powerless to protect the employees in carrying on union solicitation in or adjacent to the plant on their own time, the aim of the statute could not be achieved by employees in a large segment of American industry. Nor should it be overlooked that the rationale of the court below sanctions prohibitions of all kinds of union solicitation on the employer's premises, even though the solicitation is confined entirely to nonworking time.

The problem which this case poses has been of great concern to the Board. In its Eighth Annual Report, the Board stated that the problem "appeared and reappeared" and was "of general interest," and that it "felt it wise to evolve a clear and general policy for the guidance of employers and labor organizations alike."[10] The policy that the Board adopted, which was followed in the *Republic* and in the present case, is the policy of balancing the competing considerations previously mentioned (pp. 12–14 *supra*).

[10] National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 29.

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision conflicts with that of another Circuit Court of Appeals. It is respectfully submitted that this petition for a writ of certiorari be granted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 1.

* * * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or

condition of employment to encourage or discourage membership in any labor organization * * *

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SEC. 10.

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(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

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